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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74— .

UNITED STATES OF AMERICA *ex rel.*
ANTHONY REGINA,

Petitioner,

against

EDWIN LAVALLEE, Superintendent, State Correctional Facility at Dannemora, New York,

Respondent.

UNITED STATES OF AMERICA *ex rel.*
JOHN J. BATTISTA,

Petitioner,

against

HAROLD N. BUTLER, Superintendent, State Correctional Facility at Wallkill, New York,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In The

Supreme Court of the United States

October Term, 1974.

No. 74-

United States of America *ex rel.* Anthony Regina,

Petitioner,

against

Edwin LaVallee, Superintendent, State Correctional Facility at Dannemora, New York,

Respondent.

United States of America *ex rel.* John J. Battista,

Petitioner,

against

Harold N. Butler, Superintendent, State Correctional Facility at Wallkill, New York,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To: The Honorable Chief Justice of the United States and the Associate Justices of the United States Supreme Court.

Petitioners Anthony Regina and John J. Battista respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Second Circuit, affirming an order of the United States District Court for the Eastern District of New York, denying their application for a writ of habeas corpus to vacate a judgment and order of the New York County Court of Suffolk County.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported, and is annexed hereto as Appendix A2.

The opinion of the United States District Court for the Eastern District of New York is not reported, and is annexed as A3.

The affirmance of the judgment of conviction by the New York Court of Appeals is officially reported at 19 N. Y. 2d 65, and unofficially at 224 N. E. 2d 108 and 277 N. Y. S. 2d 683 (1966). This order affirmed the decision of the New York State Supreme Court, Appellate Division, Second Department which is reported at 25 A. D. 2d 658, 268 N. Y. S. 2d 1006 (2nd Dept. 1966). Copies of these opinions are annexed hereto as Appendix A4-A5 respectively.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was rendered on October 2, 1974. A copy of the judgment is annexed hereto as Appendix A1.

The jurisdiction of this court is invoked pursuant to 28 U. S. C. §1254 (1).

Questions Presented.

1. May a state court in a post-conviction proceeding weigh a statement by an assistant prosecutor that he made an undisclosed promise of leniency to the key prosecution witness against conflicting evidence that the promise was not made under *Giglio v. United States.*

2. Do petitioners have a burden to call before the jury as a witness the member of the prosecution staff suspected of making an undisclosed promise of leniency to the key prosecution witness as a precondition to asserting their federal claim under *Giglio* that the prosecution did not disclose the promise?

3. Is the office of the prosecutor bound by an undisclosed promise of leniency made by an assistant district attorney when at the time the assistant testified at the post-conviction hearing, he was no longer on the prosecutor's staff?

4. Is the credibility of the main prosecution witness materially affected when the witness at the trial categorically denied receiving any consideration for his testimony which an assistant prosecutor later claimed the witness did receive?

Constitutional Provisions Involved.

United States Constitution Amendment IV:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Statement of the Case.

In 1963, petitioners were convicted of murder in a New York State Court and were sentenced to serve terms of life imprisonment. The prosecution case depended entirely

on the eye witness testimony of Anthony Getch who was present when the victim Mariani was shot. Each petitioner produced evidence to support an alibi defense which the New York Court of Appeals characterized as "apparently uncontroverted 'and' impressive." Since the issue for the jury was solely a question of credibility,[1] it was of the utmost strategic importance for the defense to explain for the jury why Getch would falsely implicate petitioners. It was especially important to show a motive for Getch to cooperate since he was not an apparent accomplice with an obvious interest to cooperate in exchange for lenieney.

Because Getch was on parole at the time of the shooting, a main theme of the defense was the claim that the *quid pro quo* for Getch's testimony was a prosecution promise of lenieney concerning the amount of additional time he would have to serve as a parole violator.[2]

Getch testified that in early September, after he was informed that he was being sent back to Elmira Reformatory for his parole violation hearing he sent for a parole officer and asked him to "get in touch" with the district attorney (TR 418-421). On September 18, 1963, Getch met with the Suffolk County Assistant District Attorney Jacob Bendersky and two parole officials, at the New York City Parole Office where he signed a statement in which he identified petitioners as the men who shot Mariani.

[1]In his affirming decision, Judge Keating of the New York Court of Appeals commented "These issues were upon the entire record, questions of fact for the jury to be determined, not only from the words but also from the demeanor, interest and motives of the witnesses." *People v. Regina*, 19 N. Y. 2d 65 at 72.

[2]Getch had a long criminal record; he had spent twelve of his twenty-seven years in jail (TR 336, 337).* At the time of the shooting he was "consorting with the victim Mariani, a well known gangland figure." Getch was known to the police as a "strongarm man" (TR 1275).

*TR refers to pages of the 1963 murder trial record.

Until this September 18th meeting Getch persistently denied knowledge of the assailant's identity (TR 311). On cross examination Getch was adamant in his denials that he received any consideration, whatever for his statement implicating petitioners. (See Appendix A6 for Getch's testimony denying he received leniency.)

At the conclusion of the prosecution case, the defense failed to elicit a single hard fact to support the claim of a prosecution deal with Getch.

After the defense rested the prosecution called one of Getch's parole officers in rebuttal. This witness, Kaplan, revealed that Bendersky met with Getch and parole officer McCarthy prior to the September 18th meeting which Getch had testified was the only time he had ever met with Bendersky. Kaplan, who was present at this meeting said the purpose of the meeting was to decide "what was going to become of him (Getch)" (TR 1069-1097).

With this new evidence, the defense urgently pressed the court to produce Getch's parole file and attempted to cross examine Kaplan on the now viable issue of whether the setting of Getch's parole delinquency date which determined how much more time Getch had to serve, was the result of a "deal" with Getch, parole officials and Bendersky (TR 1076-1082). The trial judge, however, precluded further exploration of a prosecution "deal" (TR 1081-1082).

In colloquy before the judge, the defense demanded that James Catterson, the trial Assistant District Attorney, specifically admit or deny whether or not the prosecution had promised leniency to Getch (TR 1092). Catterson categorically denied that any promises were made to Getch (TR 1092-1099).

In summation, the defense was in the weak tactical position of having failed to support their contention of a prosecution promise to Getch, whereas the prosecution in summation maximized this tactical advantage. To the jury, Catterson ridiculed the contention of a promise and negated the likelihood of prosecution concealment of a "deal" by bolstering the character and credibility of Bendersky. The portions of the summation denigrating the defense claim of a deal account for approximately one quarter of the summation (TR 1149-1183).

In 1969, petitioners commenced a *coram nobis* proceeding based upon a claim that the prosecution had suppressed evidence that Getch had been promised lenieney. At the hearing, Bendersky testified that he had promised Getch he would be released from prison in a few months and that he and his family would receive an elaborate scheme of protection. (The relevant portions of Bendersky's testimony is attached as the Appendix 7.)

The state court took testimony of others who had been present when the promise was alleged to have been made and they testified that no promise concerning Getch's release was made. Catterson also testified that Bendersky told him he made no promise to Getch. The court in a decision rendered prior to *Giglio v. United States*, 405 U. S. 150 (1972), held that the petitioners failed in their burden to prove that a promise had been made. The Appellate Division affirmed and leave to appeal to the New York Court of Appeals was denied.

Petitioners then commenced a habeas corpus proceeding pursuant to 28 U.S.C. 2254 claiming that *Giglio* mandates a new trial once evidence is presented that a member of the prosecutor's staff made undisclosed promises of lenieney to the key prosecution witness. The district court denied relief on the grounds that under 28 U.S.C. §2254(d) it had to presume that the state court's finding was correct, and that the alleged promise, even if made, was not sufficiently material to warrant a new trial.

Petitioners appealed to the United States Court of Appeals for the 2nd Circuit which affirmed the decision of the district court holding that the conclusion of the state court was "fairly supported by the record." As to petitioners' claim that under *Giglio* it was improper to weigh the conflicting evidence, the court distinguished *Giglio* on two grounds. First, that petitioners, in effect, waived their right to a new trial by not calling Bendersky as a witness at the trial. Second, that Bendersky was no longer under the control of the prosecutor at the time he first claimed he made the promise. The court further affirmed, on the basis that Bendersky's promise would not have affected the judgment of the jury.

REASONS FOR GRANTING THE WRIT.

The decision below directly conflicts with the due process standards of *Giglio v. United States* for disclosure of prosecution promises of leniency.

Giglio v. United States, 405 U. S. 150 (1972) set a constitutional standard affecting the conduct of prosecution offices with respect to undisclosed promises of leniency. It places an absolute duty upon the prosecution to disclose such promises to the defense.[3] *Giglio* applies the principles of agency to attribute to the prosecution office, promises made by any member of the staff who deals with the witness even though the trial district attorney may be ignorant of the promise. Finally, *Giglio* reiterated the ruling of *Napue v. Illinois*, 360 U. S. 264 (1959), that a new trial is required as a matter of due process where the credibility of a key prosecution witness is affected by an undisclosed prosecution promise of leniency which the witness denied at trial.

[3]Promises of leniency are uniquely within the knowledge of the prosecutor as contrasted with other forms of exculpatory evidence to which the defense may have equal or reasonable access.

The decision of the Circuit Court of Appeals drastically reduces the constitutional standard of *Giglio* in four ways:

1. Under the opinion below, the prosecutor may present conflicting evidence as to whether the promise was made by his staff member to defeat a motion for a new trial, and, where the making of the promise is controverted, it places the burden of proving the promise on the defense. This approach was specifically rejected in *Giglio* where the fact that affidavits from members of the prosecution staff were in conflict concerning the making of the promise, was considered irrelevant. The underlying rationale of *Giglio*, is that our system of criminal justice places a quintessential reliance on the integrity of the prosecutor's staff.

Petitioner respectfully submits *Giglio* requires a new trial where a prosecution staff member later swears he made a promise of leniency to a witness. It is for the jury to determine issues of veracity if there is conflicting evidence as to whether the promise was made. Since the Circuit Court directly conflicts with *Giglio* on this point, this court should clarify the matter.

2. The opinion of the Circuit Court conditions the right to a federal claim of undisclosed prosecution promises of leniency upon the defense calling as witnesses before the jury, members of the prosecution who dealt with the witness where the defense "suspects" that the witness was promised leniency.

In this case the defense obtained from the trial district attorney Catterson a representation that no promises were made to Getch (TR 1096-1097) and they accepted Catterson's statement which he made in the presence of the trial judge as dispositive of the issue. Under these circumstances if the defense put Bendersky on the stand it would have bordered on incompetent representation by counsel.

Over and above these factual considerations, however, is the effect on the underlying policy of *Giglio*. Where *Giglio* would impose the absolute duty on the prosecution,[4] the Circuit Court would impose the duty on the defense to ferret out the existence of the promise by calling the suspected member of the staff to testify as a defense witness at trial. This court should clarify the apparent conflict between *Giglio* and the Circuit Court with reference to the obligation of the defense where it is suspected but not known whether or not promises of leniency were made to a prosecution witness.

3. The opinion below severely limits the explicit agency theory of prosecution misconduct enunciated in *Giglio* to cases where the prosecution staff member who claimed he made undisclosed promises of leniency is still a member of the office when he makes the claim. *Giglio* extended prior court rulings concerning prosecutorial misconduct to a situation where an assistant not involved in the trial of the case was involved in the misconduct of which the trial attorney was unaware. The effect of this ruling was a broad policy treating the office of the prosecutor as an entity and holding it responsible for the attorneys working for it. See also *Santobello v. New York*, 404 U. S. 257 (1971).

The undisclosed promise in this case was made by an assistant prosecutor representing the office of the prosecutor. The promise was made in his official capacity at a time when he had the authority to make the promise. This is the operable time period insofar as an agency view of the prosecutor's office is concerned. The fact that the person is not any longer a member of the prosecution staff when he admits making the promise does not

[4] In *Giglio*, the defense also questioned whether the witness received promises of leniency and could have called any assistant who dealt with the witness.

affect the binding nature of those promises on the principal (e. g., the prosecution). Otherwise a prosecution office, bound by the promise of a member of the staff when the promise was made, would not be bound if the employment relationship was terminated when the promise was discovered. Such an anomolous result is contrary to the agency principles adopted by this court in *Giglio*. (See Restatement Agency Second, Sec. 275 comment [c]; Sec. 278 comment [b].) Furthermore, the Circuit Court limitation on *Giglio* is patently unworkable in light of the fluctuating personnel of large prosecution offices.[5]

4. The opinion of the Circuit Court adopts a view of materiality of an undisclosed promise of lenience to a key prosecution witness which is in conflict with *Giglio* and established precedents of this court.

There can be no question that without Getch, there would have been no indictment and no case to take to the jury. He provided the only evidence implicating petitioners.

At the murder trial, Getch testified:

> Q. Now, nobody just made you a little bit of a promise? A. No, sir.
>
> • • •
>
> Q. And you didn't say to anybody or ask: Well, now, do I go back to jail if I say something? A. I was almost finished at the time (TR 424).

[5]There is no logical reason why credibility of the staff member should be affected by the termination of the employment relationship. In fact, his credibility may be heightened if the dependent employment relationship is terminated. In *Giglio* the issue of the prosecutor's credibility was left to the jury. There the assistant in question had left the prosecutor's office by the time of the appeal. Thus, at any re-trial he would be testifying to the jury with the same status as Bendersky.

At the state *coram nobis* hearing, Assistant Prosecutor Bendersky testified under oath:

> A. He then, to my recollection, inquired about his status and he wanted to get out. Now, I believe that I told him and that we agreed that it would not be appropriate to release him at the time, but that if several months went by an effort would be made to release him and that he would be released.
>
> Q. * * * Did he ask you how soon he would be released. A. I don't know whether he asked in those words, but I think the understanding was that it would be several months, he would be released in several months.

The defense position would have been dramatically enhanced if after Getch's denials of prosecution leniency, Bendersky's statement was presented to the jury. The defense in its summation could have spoken to the conflict between Getch and the numerous alibi witnesses from a position of greater strength, pitting the testimony of the alibi witnesses, against the uncorroborated testimony of a single prosecution witness who made a drastic change of his story after the prosecution made him promises, and who demonstrated a lack of compunction against perjuring himself in the trial. Disclosure would also have prevented the prosecution from delivering a damaging summation in which the defense was ridiculed and Bendersky's character and credibility was bolstered.

Giglio made it very clear that evidence which demonstrates that a main prosecution witness would lie under oath is material. *People v. Savvides*, 1 N. Y. 2d 554 (1956). The sweeping nature of the court's holding on materiality is apparent from the facts in *Giglio* where the promise of leniency was made to the main witness *after* he had given a statement implicating Giglio, and the witness even admitted he implicated Giglio to help

himself (*Giglio* Trial Record 82; 203-204). Moreover, in *Giglio* the witness was an unindicted co-conspirator a fact known to the jury from which it could infer that leniency had already been granted. In the instant case the witness was no longer in jail at the time of trial. The jury thus could not infer prosecution consideration to the witness as it could in *Napue* and *Giglio*. The Circuit Court gave this as a reason why any promise could not affect the witness's testimony. Yet, this disregards the fact that the witness gave a sworn statement to police and twice testified before the Grand Jury implicating petitioners. By the time of trial, Getch was hardly in a position to change his testimony without facing certain perjury charges.

As contrasted with the promises which have been held sufficiently material to warrant a new trial, Bendersky's promise was specific. In *Napue*, the promise was to "recommend" a reduction in a 199-year sentence and "if possible, effectuate it" *Napue*, *supra*, at 266. In a recent case *Armour v. Salisbury*, 492 F. 2d 1032 (6th Cir. 1974), the court affirmed the granting of a writ of *habeas corpus* where the prosecutor did not disclose that he visited the chief witness in prison and told him he would help him get probation whether or not he testified. The court said that the very fact of the prosecutor's visit would cause the witness to believe he would gain by testifying.

This court has adopted a pragmatic approach to disclosure of promises of leniency. It rests on the very nature of the relative power relationship between the prosecution and witnesses who are under threat of prosecution. The Circuit Court would depart from this approach and adopt a strict and patently unrealistic view of the matter which, it is respectfully submitted, will have a deleterious effect on the integrity of the administration of justice.

The questions presented here, while they bear specifically on the Due Process violation of petitioners' Fourteenth Amendment rights, also have wide national significance by reason of the frequency of the the prosecution practice to offer lenieney to witnesses under threat of prosecution. *Giglio* resolves this critical area in the administration of criminal justice with respect to the obligation of the prosecution to disclose such promises. If the opinion below stands, this area of the law will be relegated to speculation and confusion.

CONCLUSION.

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX 1.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of October one thousand nine hundred and seventy-four.

Present:

Hon. Paul R. Hays
Hon. Walter R. Mansfield
Hon. William H. Timbers
Circuit Judges.

UNITED STATES OF AMERICA *ex rel.* ANTHONY REGINA,

Petitioner-Appellant,

v.

EDWIN LAVALLEE, Superintendent, State Correctional Facility at Dannemora, New York,

Respondent-Appellee.

73-2722

UNITED STATES OF AMERICA *ex rel.* JOHN J. BATTISTA,

Petitioner-Appellant,

v.

HAROLD N. BUTLER, Superintendent, State Correctional Facility at Wallkill, New York,

Respondent-Appellee.

73-2737

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX 2.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 1060, 1067—September Term, 1973.

(Argued June 10, 1974 Decided October 2, 1974.)

Docket Nos. 73-2722, 73-2737

UNITED STATES OF AMERICA *ex rel.* ANTHONY REGINA,

Petitioner-Appellant,

v.

EDWIN LAVALLEE, Superintendent, State Correctional Facility at Dannemora, New York,

Respondent-Appellee.

UNITED STATES OF AMERICA *ex rel.* JOHN J. BATTISTA,

Petitioner-Appellant,

v.

HAROLD N. BUTLER, Superintendent, State Correctional Facility at Wallkill, New York,

Respondent-Appellee.

Before:

Hays, Mansfield and Timbers, *Circuit Judges.*

Appeal from order entered in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, denying petition for habeas corpus.

Affirmed.

BETTY D. FRIEDLANDER, Waverly, New York (Victor J. Robino, New York, New York, on the brief), *for Petitioners-Appellants.*

ARLENE R. SILVERMAN, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Respondents-Appellees.*

HAYS, *Circuit Judge*:

Petitioners brought this action for habeas corpus relief under 28 U.S.C. §2254 (1970) claiming that at the state court trial at which they were convicted the prosecution had failed to disclose a promise of leniency to a key prosecution witness. The district court denied relief. We affirm.

In early 1964 appellants were convicted in a New York court of first degree murder and first degree assault. The prosecution based its case in part on the testimony of one Anthony Getch. The defense sought to discredit this testimony by claiming that Getch, who had been subject to being returned to prison as a parole violator, had been promised an early release from prison in return for his cooperation. However, the defense did not call as a witness either Assistant District Attorney Catterson, the prosecutor at the trial, or former Assistant District Attorney Bendersky, who had handled part of the pre-trial preparation of the case prior to leaving the District Attorney's office. These were the two persons who the defense claimed might have made the promise. Both Getch and the prosecution denied that any such promise had been made.

The convictions were affirmed by the Appellate Division, 256 App. Div. 2d 658, 268 N.Y.S. 2d 1006 (2d Dep't 1966), and by the New York Court of Appeals, 19 N.Y. 2d 65, 224 N.E. 2d 108, 277 N.Y.S. 2d 683 (1966).

In 1970 appellants commenced a coram nobis proceeding in state court. The court conducted a hearing at which former Assistant District Attorney Bendersky testified that he had promised Getch that in return for his cooperation he would be released within a few months. However, other persons who had been present when the promise was alleged to have been made testified that no promise was made concerning Getch's release. The court concluded that Regina and Battista had failed to discharge their burdens of proving that a promise had been made. The Appellate Division affirmed and leave to appeal to the New York Court of Appeals was denied.

Appellants then commenced this habeas corpus proceeding, relying on *Giglio v. United States*, 405 U.S. 150 (1972). The district court denied relief on the grounds that under 28 U.S.C. §2254(d) (1970) it had to presume that the state court's finding was correct, and that the alleged promise, even if it had been made, was not sufficiently material to warrant a new trial. We affirm.

28 U.S.C. §2254(d)(8) (1970) provides that in habeas corpus proceedings by a state prisoner the federal courts shall presume the findings of fact by a state court to be correct unless they are "not fairly supported by the record."[1] See *Townsend v. Sain*, 372 U.S. 293, 316 (1963); *United States ex rel. Sabella v. Follette*, 432 F. 2d 572, 574-75 (2d Cir. 1970), *cert. denied*, 401 U.S. 920 (1971); *United States ex rel. Liss v. Mancusi*, 427 F. 2d 225, 227-29 (2d Cir. 1970); *United States ex rel. Fein v. Deegan*, 410 F. 2d 13, 17 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969). If the findings are supported by the record the petitioner bears the burden of showing that they are erroneous.

---

[1] The statute provides in pertinent part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

• • •

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made unless • • • the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 U.S.C. §2254 (1970).

In this case the record of the state coram nobis proceeding supports the finding of the state court, and petitioners have not shown the findings to be erroneous. The only testimony in behalf of appellants was given by Bendersky, who met with Getch on September 18, 1963, to discuss Getch's cooperation in the prosecution of Regina and Battista. Getch first expressed fear for the safety of his family and Bendersky assured him that they would receive protection. Bendersky claimed that he then further promised Getch that in return for his cooperation an effort would be made to release him after a few months. His testimony was somewhat equivocal, however. He qualified his remarks with such statements as "to my recollection" and "I believe that I told him." His uncertainty is not surprising since the meeting at which he allegedly made the promise occurred six years before the coram nobis hearing.

Several witnesses testified in opposition to appellant's petition. William J. Quinn, an employee of the New York State Division of Parole at the time of the meeting, testified that he was present throughout the meeting and heard the promise of protection for Getch's family, but that Bendersky had never promised Getch an early release from prison or even discussed the matter with Getch or anyone else. Orey Edwards, an employee of the Suffolk County Police Department, also testified that he attended the entire meeting of September 18 and heard the promise of protection but that Bendersky neither made any promise concerning nor even discussed the subject of Getch's parole.

The testimony of these two witnesses furnishes fair support in the record for the state court's finding. But there was additional evidence which further buttresses the finding. Getch himself had testified at the trial that no promise had been made. James Catterson, Jr., who became an Assistant District Attorney in Suffolk County on September 1, 1963, and took over prosecution of appellants, testified that in January or February of 1964 he met with Bendersky to discuss the case. He asked Bendersky whether any promises had been made to Getch, and Bendersky replied

that no promises had been made except the promise to protect Getch's family. Catterson also testified that he spoke to Getch before speaking to Bendersky and that Getch had told him no promises had been made. John McCarthy, a parole officer with the New York State Division of Parole, testified that he was present during the first part of the meeting of September 18 and that he heard no promise of early release. Quinn, Edwards and McCarthy also testified that Bendersky never discussed Getch's parole status with them or, to their knowledge, with anyone else connected with the Division of Parole. Appellants produced no testimony that Bendersky had discussed the matter with anyone else.

The testimony at the coram nobis proceeding also showed that shortly after the meeting of September 18 began, a stenographer was brought in to take the minutes of the meeting. The minutes contain many references to promises of protection, but the only reference to Getch's release tends to negate appellants' claim. The minutes show that near the end of the meeting Getch asked Quinn if it would be possible for him "to get home before Christmas" and that Quinn replied that "this matter would have to be discussed with the Parole Board and that Getch would be advised of their decision in the future."

The conclusion of the state court was "fairly supported by the record." Under the circumstances the district court acted properly in denying the habeas corpus petition without a hearing. See, e.g., *United States ex rel. Liss v. Mancusi*, *supra*, 427 F. 2d at 227-29.

Appellants claim that under *Giglio v. United States*, 405 U.S. 150 (1972), it was improper for the state court to weigh the conflicting evidence in the coram nobis proceeding and for the federal district court to accept the state court's conclusions. They assert that once the new evidence was presented the court was obliged to order a new trial so that the conflicting evidence could be weighed by a jury. Under the circumstances of this case we cannot agree.

First, by failing to call Bendersky as a witness at trial appellants waived their right to claim that he had made a promise to Getch. Unlike *Giglio*, this is not a case where defendants had no inkling of a promise at the time of the trial. An alleged promise by Bendersky was an integral part of the defense. Bendersky was readily available as a witness. The defense consciously decided not to call him. Appellants should not be permitted first to claim before the jury that a promise was made, without calling the person who purportedly made the promise, and then only after the first tactic had failed, to call that person as a witness in a habeas corpus proceeding in an attempt to obtain a new trial. A defendant may not obtain a new trial on the basis of evidence which he could have discovered by reasonable diligence. *United States v. Marquez*, 363 F. Supp. 802, 808 (S.D.N.Y. 1973), aff'd mem., 490 F. 2d 1383 (2d Cir. 1974); *United States v. Munchak*, 338 F. Supp. 1283, 1293-94 (S.D.N.Y.), aff'd, 460 F. 2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1972); *United States v. Edwards*, 366 F. 2d 853, 873-74 (2d Cir. 1966), cert. denied, 386 U. S. 908, 919 (1967).

Second, this case arises in a procedural setting very different from *Giglio*. *Giglio* involved a motion for a new trial addressed to the trial judge before a direct appeal to the Court of Appeals had been concluded. The claim by the Assistant United States Attorney followed the conviction closely and occurred while he was still with the United States Attorney's office and under its control. Under such circumstances, the argument for a new trial is much stronger than here, where Bendersky first claimed to have made the promise six years after trial and more than six years after he left the District Attorney's office.

We also affirm on the ground that the additional evidence brought out at the *coram nobis* hearing was not material. In *Giglio*, the Court stated:

> "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly

> useful to the defense but not likely to have changed the verdict . . . .' *United States v. Keogh*, 391 F. 2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required 'if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' *Napue, supra*, at 271." 405 U.S. at 154.

In this case Bendersky's testimony was equivocal and the promise he claimed to have made was quite vague. The trial occurred only after Getch had completed his term, thus rendering it even more unlikely that any promise affected his testimony. Moreover, the State has shown that it has overwhelming evidence that no promise was made. Finally, Bendersky's testimony would also permit the disclosure of the promise to protect Getch's family, which would probably have an adverse effect on appellants' case. Thus it is most unlikely that the new testimony would have "affected the judgment of the jury."

For the foregoing reasons the decision of the district court is affirmed.

MANSFIELD, *Circuit Judge* (Concurring):

I concur, but on limited grounds.

The principal issue, as I view it, is not whether a promise was in fact made by Bendersky to Getch but whether the state, at or immediately prior to trial, knew that Bendersky might furnish evidence of such a promise and failed to disclose that fact to appellants. If so, the next question is whether the evidence was material.

On the first issue there is no showing that the state had any knowledge that Bendersky would testify to a promise. On the contrary, Assistant District Attorney Caterson (whose testimony was credited by the state *coram nobis* judge in findings that were properly accepted by Judge

Mishler pursuant to 28 U.S.C. §2254[d]) testified that shortly before trial Bendersky denied having made the alleged promise. Furthermore, since Bendersky was not employed by the state at the time of trial, which is the crucial period for our purposes, his knowledge, unlike that of Assistant U.S. Attorney DiPaola in *Giglio v. United States*, 405 U.S. 150, 152 n.1 (1971), cannot be attributed to the state as the basis for a claim of non-disclosure. Thus there was no concealment or negligent non-disclosure, which is essential to the grant of relief. See *Brady v. Maryland*, 373 U.S. 83 (1963). For these reasons I see no need to decide whether appellants waived their present claim by failing to call Bendersky as a witness at the trial.

On the question of whether in any event the alleged promise was material, I agree that it was not, for the reasons stated by Judge Hays in his opinion.

APPENDIX 3.

Memorandum Decision and Order of Mishler, J., Denying Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA *ex rel.* ANTHONY REGINA,

Petitioner,

against

EDWIN LAVALLEE, Superintendent, State Correctional Facility at Dannemora, New York,

Respondent.

73 C 703

UNITED STATES OF AMERICA *ex rel.* JOHN J. BATTISTA,

Petitioner,

against

HAROLD N. BUTLER, Superintendent, State Correctional Facility at Wallkill, New York,

Respondent.

73 C 704

August 9, 1973

Petitioners in these two related petitions were each convicted in 1964 of the crimes of first degree murder and first degree assault. They were each sentenced to life imprisonment for the murder conviction, and terms

of five to ten (Regina) years and five to fifteen (Battista) years for the assault conviction, the assault sentences to run concurrently with the murder sentence. Petitioners claim that their fourteenth amendment right of due process was violated in that

> "the prosecution either deliberately or negligently suppressed evidence that a member of its staff had promised the only prosecution eye-witness his early release from prison and security arrangements of substantial monetary value for his family as an inducement to testify against the [petitioners], permitted the witness to testify falsely in regard to whether any promises had been made to him, and in summation deliberately led the jury to believe that no promises had been made and ridiculed the suggestion that they had."

Petitioners demand a new trial, citing *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972).

Petitioners raised the same claim in a state writ of error *coram nobis*. Petitioners received a full, fair, and adequate hearing in Suffolk County Court on their claim. After the hearing, Judge Lipetz found that

> "the defendants have failed to sustain their burden of proof by a wide margin that Getch [the eye-witness] testified falsely. Moreover, there is no proof whatever that the District Attorney knowingly permitted false testimony to be used at the trial."

This finding must be presumed to be correct. 28 U.S.C. §2254(d).

Furthermore, *Giglio* clearly would not apply herein. In *Giglio*, the Government failed to disclose a promise of immunity from prosecution that had been made to a key Government witness. The Court held that since the suppressed evidence was material on the issue of credibility, the petitioner was entitled to a new trial. In the case before this court, there is no reasonable likelihood that

Getch's allegedly false testimony (as to whether any promises had been made to him) affected the judgment of the jury, and *Giglio* does not apply. Had the jury been informed that Getch was promised protection, it would have prejudiced petitioners' case; witnesses generally do not need protection from innocent defendants. A disclosure of the alleged promise to shorten Getch's parole violation sentence would likewise not have affected the credibility of the substance of Getch's testimony. Getch in fact served out his complete sentence, regardless of any alleged promises to the contrary, and he had already been released several months prior to the trial. At the time of the trial, he was no longer subject to the jurisdiction or control of the parole board and thus was under no compulsion to testify for the prosecution.

The petitions are in all respects denied and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgments in favor of respondents and against petitioners dismissing the petitions.

The Clerk of the Court is directed to forward copies of this memorandum of decision and order to the petitioners.

JACOB MISHLER
U. S. D. J.

APPENDIX 4.

Opinion.

People v. Regina, 19 N. Y. 2d 65

KEATING, Judge

Upon the sole direct testimony of one Anthony Getch, the appellants, Anthony Regina (also known as "Fat Tony") and John J. Battista (also known as "Moose"), stand convicted of murder in the first degree and assault in the first degree.

The defense at the trial (Suffolk County Court; McInerney, J.) was alibi. Each appellant alleged and attempted to prove through various witnesses that he was 60 or 65 miles away from the place of the murder at the time of the murder. The jury disbelieved them.

On this appeal, the appellants urge that the testimony of Anthony Getch was unbelievable as a matter of law and that certain prejudicial errors were committed at the trial.

At about 1:30 in the afternoon of August 9, 1963 Anthony Getch, Louis Mariani, the deceased, and Louise Mangiamelli, the sister-in-law of Mariani, were driving along a highway near Port Jefferson in Suffolk County when another automobile 69 carrying three persons pulled alongside on the right and began firing pistol shots into the car driven by Mariani.

Mariani was killed. Louise Mangiamelli, who was sitting in the center of the rear seat, testified that she ducked down to the floor and saw nothing. Anthony Getch, who was sitting in the front passenger's seat, testified that, in the few seconds before he ducked under the dashboard, he observed the car alongside, saw the appellant Regina driving, pointing, and firing a pistol, and saw two other persons in the car, one of whom he recognized as the appellant Battista and the other of whom remains unidentified

Getch's testimony is crucial and the contention that it is incredible and unbelievable as a matter of law demands that it receive special scrutiny.

At the time of this murder, Getch was on parole after a felony conviction for assault and robbery. At 27 years of age, he had spent the greater part of the last 12 years of his life in jail for one crime or another. From the sentencing minutes it appears quite clearly that the victim, Mariani, was a gangester in one organization "known as the Gallo mob." The appellant Regina, was a member of the rival Profaci group. Getch, it may be inferred, was also involved with the Gallo mob and, indeed, the prosecution as well as the appellants assume that this killing was merely one in a series of killings since about 1960, growing out of a fued between the two rival organizations. There is, however, no testimony establishing a relationship between Battista and either gang.

Getch testified that they were driving along when a big black car pulled alongside of them. The radio in the other car was very loud. Getch turned and saw Regina driving. He also saw Battista sitting in the back seat behind Regina and another man whom he never saw before or after was in the front seat next to Regina. Regina raised a pistol in his right hand and started firing in Getch's direction. As he did so, Getch ducked toward the dashboard. The entire elapsed period between the time that the first shots were fired was four or five seconds. When he raised his head again, the black Chrysler was gone.

According to the appellants, it is inconceivable that during the 4 or 5-second period Getch could have seen all of the following:

(1) Regina, driving with one hand and pointing the pistol with the other, looking at Getch and at the road ahead, while Getch, throughout, was looking at Regina, at Regina's gun and at everyone else in this auto;

(2) that another man was next to Regina whom Getch did not recognize but that he kept his eyes on this person too at all times; (3) that Battista was sitting in the back seat and that he, Getch, observed him throughout; (4) that, during a part of this time, Regina's vehicle was within 2 feet of the vehicle in which he was riding, and (5) that Getch waited until 2 shots were fired before ducking down.

Extensive comment upon this aspect of the case is unnecessary. Essentially, as is the situation with so much of this case, nothing more than an issue of credibility was created. There is nothing inherently inconceivable or even unusual about the above testimony by Getch. Common experience dictates that a person can observe an entire scene or more than one person at a time, especially where the grouping is within narrow confines, such as an automobile.

We come now to the alleged inconsistencies in Getch's story. The appellants point to a number of occasions, pretrial and before the Grand Jury, on which Getch stated that he ducked down as soon as he saw a pistol and, thus, presumably before the shooting started. Getch, however, also testified that he started ducking *after* 2 shots were fired and that he saw Battista only when he, Getch, was going down.

There is one other apparent but unexplained contradiction in Getch's testimony. He was held immediately after the killing as a parole violator and as a material witness. When first questioned, he said only that the other car was a 1951 or 1952 tan colored Oldsmobile, but he denied any other knowledge of the killing. It was only after Getch was told that he would be returned to Elmira Prison as a parole violator that he asked to speak with the District Attorney and agreed to give him a statement. The only explanation for the contradiction as to the car's color is his statement that, after the killing, he "told her (Louise Mangiamelli) to say that she seen an Oldsmobile, and she says she would say it's green and I would say it's tan."

Mrs. Mangiamelli only admits to having seen a green car in front of her after she got up from the floor of the rear seat. She saw nothing else.

The alibi testimony was unimpeached, save for the fact that it was also obviously disbelieved by the jury. It drew for the jury a sharp question of fact and it may be summarized briefly.

Appellant Battista offered the testimony of 8 witnesses, who stated, in substance, that on August 9, 1963, at the time of the murder, Battista was at work on the pier of his employer in Brooklyn.

Frank Florio, the timekeeper at the pier, testified that he checked Battista in to work at 1:00 p.m. but it is unclear whether his testimony is based entirely on written records or at least in part on independent recollection.

Joseph DePippo testified that Battista was on line in front of him at the pier when he checked in to work.

Anthony Giordano testified that he spoke to Battista for about 15 or 20 minutes at 1:00 p.m. about the killing of one Joe Batts and that a man by the name of Joe Barbella was present throughout the conversation.

Barbella confirmed his presence and his meeting with Battista that afternoon.

Jerry Aloi, a coemployee of Battista's, also saw Battista at the pier at about 1:00 p.m.

John G. Foray, an employee of the Waterfront Commission, testified from records kept in the regular course of the commission's business that Battista was recorded as having worked on the pier on the day in question, but he also stated that the record 72 information was furnished by a hiring agent, an employer of Battista's employer, and that he had no knowledge of the accuracy of the information.

Two additional employees also testified to Battista's presence on the pier that day.

The alibi testimony on behalf of appellant Regina sought to establish that he was at his home in Commack, Long Island, during that entire day.

Carol DeSerio, a friend of the Regina family, stated that she called and spoke to Regina at 12:18 p.m. on August 9, 1963. She invited him to ride into New York City with her, but he turned down the offer, explaining that it would take her out of her way. New York Telephone Company records confirm the placing of a call between the two residences at 12:18 p.m. for 4 minutes. Regina's wife testified that her husband was at home all day and that various telephone calls were placed and received between 12:00 m. and 1:00 p.m.

(1) The amount of apparently uncontroverted alibi testimony in this case is impressive, especially when it is viewed against the sole contrary testimony of Getch, who allegedly was a rival gang member. On the other hand, it is well to keep in mind that if the killing was a premeditated gangland murder, as the prosecution urged, it is not inconceivable that the testimony of alibi and the telephone calls were also pre-planned. These issues were, upon the entire record, questions of fact for the jury, to be determined, not only from the words but also from the demeanor, interest and motives of the witnesses. Clearly, we cannot agree with appellants that the testimony of Getch was incredible as a matter of law.

(2) The proof against appellant Battista is not as strong as the proof against Regina. Nonetheless, it is adequate to sustain the conviction. This proof rests on circumstantial evidence from which inferences may be drawn, but the evidence appears to be direct, substantial and unequivocal.

In their brief appellants hedge between referring to 3 persons in the car or 4 persons in the car, and with good reason. Indeed, if the proof showed there were 4 persons in the car, and with good reason. Indeed, if the proof showed there were 4 persons in the Chrysler, a reversal as to Battista might be necessary, on the ground

that only 3 pistols were fired within the 5-second period as indicated by testimony of ballistics experts regarding results of examination of the car.

Getch was initially asked "how many men were in the car besides this fellow you know as Fat Tony (Regina)?" Getch answered "Three", thus indicating that there were 4 in the car altogether. It is manifestly clear, however, that this answer was a mistake resulting from Getch's having misunderstood the question. Immediately after giving the above answer, Getch mentioned that Battista was in the rear seat and that there were only 3 men in the car and, when confronted with the prior testimony, he stated that that answer was a mistake.

Getch also testified that during the 4 or 5-second period there were "Maybe fifteen or fourteen" shots fired, not less than 10 and perhaps as many as 20. A ballistics expert testified that there were 9 bullet holes in the Mariani vehicle though, as the appellants point out, there could have been as few as 8 shots since one hole in the vehicle was an exit hole. Of course, it is entirely possible that a number of shots missed the vehicle altogether and, since the windows in the Mariani vehicle were open, it is also possible (if not probable) that the bullet which struck Mariani in the head and killed him is not included in the count of 8 or 9 shots into the vehicle itself. There were, at any rate, an absolute minimum of 8 shots and an approximate maximum of 20 shots fired from a vehicle carrying 3 persons within a time period at no time estimated to be more than 5 seconds.

When this evidence is coupled with the expert testimony which, if believed, established that during the 5-second period 3 separate weapons, none of which were automatic, were fired, I believe that any deficiency which would otherwise result from the failure of anyone to actually see Battista with a weapon is satisfactorily overcome. This circumstantial evidence, if accepted by

the jury, as it quite obviously was, points unequivocally to the direct involvement and participation of all 3 persons in the car driven by Regina and it excludes to a moral certainty, though perhaps not to an absolute or metaphysical certainty, every other hypothesis consistent with innocence. It meets, in other words, the required test for certainty of circumstantial evidence laid down in such cases as *People v. Harris*, 306 N. Y. 345, 118 N. E. 2d 470, and *People v. Eckert*, 2 N. Y. 2d 126, 157 N. Y. S. 2d 551, 138 N. E. 2d 794. And, of course, this chain of circumstantial evidence goes only to the question of Battista's actual participation in the killing. There is direct evidence of the eyewitness Getch which places Battista at the scene of the murder.

(3) With the proof as it is here, and especially in the light of the People's theory of a premeditated killing, this court's statement in *People v. Harris*, 136 N. Y. 423, 429, 33 N. E. 65, 67, seems particularly appropriate: "The necessity of a resort to circumstantial evidence in criminal cases is apparent in the nature of things, for a criminal act is sought to be performed in secrecy, and an intending wrongdoer usually chooses his time, and an occasion when most favorable to concealment, and sedulously schemes to render detection impossible. All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts."

We are urged to hold that the following sequence of events constituted prejudicial error. After Louise Mangiamelli testified to having no knowledge of who fired the shots, the prosecution recalled Getch to the witness stand and elicited from him that immediately after the shooting Mrs. Mangiamelli stated "That fat bastard. Shooting with me in the car." The testimony was objected to on the ground that it constituted improper rebuttal.

The appellants contend that this evidence was inadmissible to corroborate the testimony of Getch implicating the appellants and that reversible error was committed by the court's failure then, or during the charge to the jury, to limit the use of the testimony to the impeachment of Mrs. Mangiamelli only.

No request to so charge the jury was ever made but, aside from that obvious defect, we are convinced that on this voluminous record the error could not have been prejudicial.

The only additional reference to this statement came during the court's summation of the evidence where he stated "That she (Mrs. Mangiamelli) did not say to Getch, 'That bastard Fat Tony is shooting at me.'" The court does not refer to it in 75 summarizing Getch's testimony; both defense attorneys urge that there is no corroboration of Getch at all in their summations without referring once to this testimony and, the prosecutor, who urged throughout his summation that internal corroboration of surrounding circumstances did exist, never once mentioned this statement by Mrs. Mangiamelli as corroboration, or otherwise.

(4) Thus, although it is clear that the evidence was admissible only to impeach and not as affirmative evidence of guilt (*People v. Freeman*, 9 N. Y. 2d 600, 605, 217 N. Y. S. 2d 5, 8, 176 N. E. 2d 39, 41; *People v. Ferraro*, 293 N. Y. 51, 56-57, 55 N. E. 2d 861, 863-4; Richardson, Evidence [9th ed.], Sec. 513), we do not think there is any basis for believing that the error was prejudicial or that it warrants reversal.

(5, 6) We would only add, in addition to what has already been noted on this point, that the objection made on erroneous grounds at the trial and overruled may only be considered on appeal as to the ground specified (Richardson, Evidence, *supra*, Sec. 543) since it was properly admissible if limited to use as impeaching testimony. And, of course, it is still necessary that an exception be taken to the court's charge or failure to charge (Code Crim. Proc. Sec. 420-a).

Another question in the case arises from the court's refusal, upon request, to direct that prior statements given by *defense* witnesses to the prosecution be turned over to defense counsel. The request falls squarely within the rule stated in *People v. Malinsky*, 15 N. Y. 2d 86, 90, 262 N. Y. S. 2d 65, 69, 209 N. E. 2d 694, 697, though it occurs in a somewhat different factual setting. In *Malinsky*, we said: "defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, *provided only* that the statement, 'relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential.'"

Both Joseph Barbella and Joseph DePippo testified as alibi witnesses to Battista's presence at work at the time of the killing. During the People's cross-examination of Barbella, the District Attorney asked if Barbella had previously given the prosecution a signed statement. Barbella answered affirmatively and the statement was thereupon marked for identification. Cross-examination continued and, at its conclusion, defense counsel asked to see the statement. His request was refused on the ground that it was inadmissible.

Substantially the same circumstances occurred when DiPippo was cross-examined.

The question, it seems to us, is whether the same "right sense of justice" which prompted our mandate in *Malinsky (supra)* is applicable here. The answer, we think, depends upon the use to which defense counsel could have put the statement, whatever it contained.

In *Malinsky*, of course, the prior notes made by the People's witness could have been used by defense counsel to impeach, to contradict, or to show a subsequent fabrication on the part of such witness. (See, also, *People v. Rosario*, 9 N. Y. 2d 286, 213 N. Y. S. 2d 448, 173 N. E. 2d 881, 7 A. L. R. 3d 174.) In the present case, we perceive no ground whatever upon which defense counsel could have employed the statement.

It could not have been used to impeach the appellants' *own* witnesses. Indeed, no conceivable reason exists why counsel should wish to do so. Upon cross-examination by the prosecution, these witnesses were in no way impeached, nor indeed was there any claim, expressly or implication, that their tale was a fabrication of recent origin. And even if it was, or if such were the claim, as the appellants admit, they would be unable to show that the statements were taken before a motive to fabricate existed.

(7) No basis that we are aware of thus existed for the use of the statements by defense counsel in any case. All of the grounds upon which such a statement might be used, whether or not it varied from the witness' testimony (see *People v. Rosario, supra,* p. 289, 213 N. Y. S. 2d p. 450, 173 N. E. 2d p. 882), are inapplicable to a situation like the present one.

(8) The appellants also contend that the trial court improperly precluded defense counsel from determining whether Getch had been given special consideration by the parole board in return for his testimony. Getch consistently denied receiving special treatment. There is no merit to this point. Getch's parole officer testified at length. Getch had been convicted of robbery in the third degree in July, 1959 and was sentenced to a 5-year reformatory sentence at Elmira. He was paroled in April, 1961, and was charged as a parole violator as of August 8, 1963, the day prior to the murder, for consorting with an undesirable character. He was released in November, 1963, with credit for parole time served between his original release in April, 1961 and his declared delinquency in August, 1963.

It was the appellants' contention that the parole board if it had seen fit, could have refused to give Getch credit for the time he was on parole and that the failure to do so constituted part of a deal or special consideration. The question, though really an issue of law, was explored through the testimony of the parole officer and he consistently stated that he knew of no case in which the

parole board had pre-dated a delinquency and that it did not have the authority to do so. Delinquency, according to his testimony, could only begin to run from the date on which delinquency is actually committed and declared, and there is no authority for vitiating credit for prior good time served while on parole.

This issue was exhaustively gone into on the trial, notwithstanding the court's recognition that the issue was really one of law and the testimony given fully corroborated the pertinent provision of the Correction Law, Consol. Laws, c. 43 (Sec. 218; See *People ex rel. Dote v. Martin*, 294 N. Y. 330, 62 N. E. 2d 217). The court gave defense counsel full leeway to explore this issue and no error was committed in this respect.

The final point urged relates to the testimony of one Detective LoDestro who, on direct examination for the People, testified that, on the night of the murder, at 7:30 p.m., he saw the appellant Regina riding as a passenger in an automobile. This testimony followed testimony by Regina's wife to the effect that Regina was home all that day and evening. On cross-examination, defense counsel asked if the detective had made any notes of this occurrence "that night," to which LoDestro answered "No." Thereafter, on redirect, LoDestro was asked if he had ever made any notes of the occurrence and he answered that he had in fact done so three days later on August 12. The answer was given over objection and the matter was pursued no further.

Appellants claim that the testimony was improperly allowed to buttress LoDestro's prior testimony, notwithstanding the defense's failure to suggest that it was a recent fabrication.

(9) The People contend that the defense, on cross-examination, attempted to infer that LoDestro's testimony was a recent 78 fabrication. We do not read the relevant portion of the record as the People do. The defense did no more than attempt to show that it was too dark for LoDestro to have seen what he claims to have seen. We

note, incidentally, that in one respect LoDestro's testimony was patently absurd. Upon repeated questioning, he persisted in asserting that at between 35 and 40 miles per hour, on a clear road, it took his car and the car in which Regina was a passenger about 10 minutes to travel half a mile.

Be that as it may, however, the prosecution's question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense. It was entirely proper (*People v. Buchanan*, 145 N. Y. 1, 23, 24, 39 N. E. 846, 853, 854; Richardson, Evidence [9th ed.] Sec. 531).

(10) The appellants were afforded a full and fair trial. Only the existence of an alibi was really an issue and, when all is said and done, this boiled down to a pure question of fact for the jury.

The judgments of conviction should be affirmed.

Desmond, C. J., and Fuld, VanVoorhis, Burke, Scileppi and Bergan, JJ., concur.

Judgments affirmed.

APPENDIX 5.

The People, etc., Respondent, v. Anthony Regina, also known as "Fat Tony" Regina, Appellant.

The People, etc., Respondent, v. John J. Battista, also known as "Moose" Battista, Appellant.

Supreme Court, Appellate Division, Second Department. March 7, 1966. Bernard C. Smith, Dist. Atty., Riverhead, for respondent; Lawrence J. Bracken, Riverhead, of counsel. Vernon C. Rossner, New York City, for appellants. Appeal by defendants from separate judgments of the

County Court, Suffolk County, rendered April 17, 1964, convicting them of murder in the first degree and assault in the first degree, upon jury verdicts, and imposing sentence. Judgments affirmed. No opinion.

Brennan, Hill and Rabin, JJ., concur.

Christ, Acting P. J., and Hopkins, J., dissent and vote to reverse the judgment of conviction and to order a new trial, with the following memorandum in which Christ, Acting P. J., concurs: The defendants have been convicted of murder in the first degree and assault in the first degree. Their convictions rest entirely on the testimony of Francis Getch. Getch testified that on August 9, 1963 he and Louise Mangiamelli were riding as passengers in an automobile operated by Louis Mariani on Nesconsit Highway toward Port Jefferson at about 1:30 in the afternoon. Mariani was killed and Getch wounded, by shots fired from an automobile passing in the same direction. Getch identified the driver of the second automobile as the defendant Regina and testified that it was Regina who fired the shots; he identified the defendant Battista as one of the three other occupants in the Regina automobile. Getch's identification of Regina was derived from seeing Regina driving an automobile in Brooklyn on four occasions while Getch was standing on the sidewalk; and Getch's identification of Battista was based on seeing Battista ten or fifteen times over a two year period. Getch had never met or talked with either Regina or Battista. Neither Regina nor Battista testified. Their defense was an alibi. Battista produced several witnesses who testified that on the day and hour of the crime Battista was working as a longshoreman at a pier in Brooklyn; and records of the Waterfront Commission and of the payroll of Battista's employer substantiated the fact of Battista's presence on the pier at that time. Regina produced two witnesses, his wife and a friend, who testified that he was at home in Commack at the time of the shooting. A jury question was thus presented by the evidence. Getch's credibility was assailed on several fronts: (1) he did not identify the defendants as the

killers until more than a month after the crime and then only after he had been apprehended for a violation of parole and while in jail; (2) he had a sight of the defendants for only a few seconds during the volley of shots; and (3) he had been previously convicted of robbery in the third degree. Nevertheless, Getch's testimony was believed by the jury, and the defendants' alibi evidence was not. Louise Mangiamelli, the other eye witness to the shooting, was not called by the People. Her testimony was elicited by the defendants and she testified that she did not see the occupants of the automobile from which the shots came. On cross examination by the prosecution, she was asked, over objection, whether she had said to Getch immediately after the incident that "Fat Tony" (referring to Regina) had fired the shots at them and she answered in the negative. In rebuttal, the People recalled Getch, who testified, over objection, that Louise Mangiamelli had in fact made that statement to him. Getch's testimony clearly could be received, not as affirmative evidence of guilt, but only for the purpose of impeaching Louise Mangiamelli's testimony (*People v. Freeman*, 9 N. Y. 2d 600, 605, 217 N. Y. S. 2d 5, 176 N. E. 2d 39; *People v. Ferraro*, 293 N. Y. 51, 56-57, 55 N. E. 2d 861; *Matter of Roge v. Valentine*, 280 N. Y. 268, 276-277, 20 N. E. 2d 751). The duty fell on the trial court to instruct the jury that the prior inconsistent statement was received only to impeach credibility and not as proof of that defendant's guilt (*People v. Tisdale*, 18 A. D. 2d 274, 276, 239 N. Y. S. 2d 226). The jury was not so informed by the trial court and this failure, under the circumstances of the case, appears to me to be prejudicial. The defendants were in no position to combat Getch's testimony of what Mrs. Mangiamelli said and it might well have been taken by the jury as corroborative of his identification of the defendants. The issues of fact were close and difficult, as was reflected by the fact that the jury did not render a verdict until two days had passed after the case had been given to them. Any evidence

that might have been considered by the jurors as strengthening Getch's testimony would be decisive in leading them to a finding of guilt. Here, the use of Getch's rebuttal testimony for the corroboration of his identification of the defendants was open to the jury in the absence of instructions to the contrary. As was remarked in *People v. Ferraro* (*supra*, 293 N. Y. at 57, 55 N. E. 2d 861): "* * * we may not say that such an error did not affect the substantial rights of the defendant involved in the jury's determination of guilt." I am constrained, therefore, to vote to reverse and for a new trial.

APPENDIX 6.

People's Witness, FRANCIS ANTHONY GETCH, cross.

(TR 424) Q. And were you told, were you not, yes or no, that you wouldn't have to go back to jail if you testified? A. No, sir.

Q. Didn't somebody make you just a little promise that if you told them something you wouldn't have to go back to jail, yes or no.

* * *

Q. Now, nobody just made you a little bit of a promise? A. No, sir.

Q. And you didn't say to anybody or ask: Well, now, do I go back to jail if I say something? A. I was almost finished at that time.

Q. No: I just asked you: Did you, yes or no, say to anybody in that little room there with Mr. Bendersky, Mr. Quinn and Chief Edwards, that you didn't want to go back to Elmira and that you would tell a story— A. (Interposing) No, sir.

Q. Let me finish, would you please? A. Yes, sir.

(TR 425) Q. The answer will be "No" isn't that so? A. Yes, sir.

* * *

(TR 429) Q. When you got back to the jail, was it in your mind that you were going to go back to Elmira? A. Yes, Sir.

Q. Was it in your mind that you were going to do the full time that you owed the State of New York? A. Yes, sir.

* * *

(TR 430) Q. You never asked anybody, anyone there, or Mr. Quinn when you first saw him, or anybody else—yes or no—as to whether or not you'd get some kind of a break for your testimony? A. No, sir.

(TR 430) Q. Did you ever ask Mr. Quinn, Mr. Bendersky, or Mr. Edwards or anyone else at any time what you were going to get out of it, yes or no? A. No, sir.

Q. Huh? A. No, sir.

* * *

APPENDIX 7.

Excerpts From Record of State *Coram Nobis* Hearing.

JACOB BENDERSKY, residing at 134 Broadway, Amityville, Long Island, New York, called as a witness in behalf of the defendants, having first been duly sworn, testified as follows:

Direct Examination by Mr. Edelbaum:

Q. Mr. Bendersky, what is your occupation? A. An attorney.

Q. And how long have you been an attorney? A. Over 30 years.

Q. Were you ever an Assistant District Attorney on the staff of the District Attorney's office of Suffolk County? A. Yes.

Q. Will you tell his Honor when you were and over what periods? A. My recollection is that I was an Assistant District Attorney from February, 1943 to 1963 with the exception of approximately five years between 1951 and '52 to '57.

Q. Now,—

Mr. Edelbaum: May I just have that first record, Your Honor?

(Shown to Mr. Edelbaum.)

Q. In September of 1963,—in August of 1963, were you on the staff of the District Attorney's office of Suffolk County? A. I don't remember, but if you could refresh my recollection.

Q. Do you recall the case of a shooting involving a man by the name of Louis Benjamalli (*sic*)? A. Yes.

Q. And were you on the staff of the District Attorney's office at that time? (8) A. Yes.

Q. And what was your position at that time? A. I believe I was Chief Assistant Trial Attorney, District Attorney.

Q. Did you have anything to do with the investigation of that case? A. Yes.

Q. Do you recall a man named Francis Anthony Getch? A. Yes.

Q. In September of 1963, did you have occasion to interview Mr. Getch at his request at the City Prison, Manhattan, commonly known as the Tombs? A. I don't remember when it was I did interview him. I don't remember whether it was at his request, and I did not interview him at the Tombs. I interviewed him at the Parole Board office.

Q. Parole Board office? A. On Broadway, New York, in New York.

Q. And at that time, did the District Attorney's office to your knowledge desire to use him as a witness in the case against Anthony Regina and John J. Battista?

The Court: What time is that, sir? Do you mean September of which Mr. Bendersky (9) said he wasn't certain of, or do you mean at the time of the interview?

Mr. Edelbaum: At the time of the interview. Thank you, Judge.

A. We were interested in discussing the matter with him.

Q. Do you know whether or not at that time Mr. Getch was being held as a parole violator? A. I know he was in jail and my impression was at that time, I believe, that he was a parole violator.

Q. Now did you have a discussion with him at that time, yes or no? A. Yes.

Q. At that time, did you make on behalf of the District Attorney's office any promises to him if he would testify as a witness for the prosecution? A. I had a discussion with him.

Q. Concerning what the District Attorney's office would do for him, if anything? A. Well—

Q. Will you tell us what happened? A. Yes. I interviewed him along with several other individuals in the office of the Parole Board and at that (10) time he told us that he was afraid for his life and for the safety of his family, who I believe lived in Brooklyn, and he was assured that maximum protection would be given to him. He was informed as a matter of fact, that he would be brought out here with his family into Suffolk County and that he would be given security. He then, to my recollection, inquired about his status, his own personal status, and he wanted to get out. Now, I believe that I told him and that we agreed that it would not be appropriate to release him at the time, but that if several months went by an effort would be made to release him and that he would be released. This being for the reason that if he was released immediately, it would become common knowledge then that he was cooperating with the District Attorney's office with respect to his homicide and he then assured me that he would tell me and give me the facts as they actually happened that morning in Port Jefferson, or near Port Jefferson.

Q. Did you tell him how soon—question withdrawn. Did he ask you how soon he would be released? A. I don't know whether he asked that in those words, but I think the understanding was that it would be several months, he would be released in several months.

Q. And did you have any discussions with the Parole (11) Board later on? A. I believe a representative of the Parole Board was there and my recollection is that they agreed to that.

Q. And to your knowledge, isn't it a fact that he was paroled in November of 1963? A. I don't know that of my own knowledge.

Q. When did you leave the District Attorney's office? A. I think it was towards the end of '63, prior to the time of this action.

Q. But you were there in November? A. I think.

Q. Of '63. A. Was there.

The Court: What is the significance of the November date?

Mr. Edelbaum: Because, Your Honor, he was held—perhaps I'll develop it.

Q. Do you know how long it was that he was supposed to be held by the Parole Board? A. You mean after I had interviewed him?

Q. No. If you hadn't intereeded with the Parole Board, how long would he have been held? A. I don't remember.

(12) Q. And you have no knowledge of whether or not he was reparoled? A. (Shaking head.)

Q. Well, do you know this, sir: Was he released to your office, to the custody of your office, and was he put in protective custody with his family? A. Subsequently, he was.

Q. He was? A. (Nodding head.) I believe.

Q. And isn't it a fact that it was before the expiration date, final expiration date of his parole? A. I don't know.

Q. All right. Thank you.

• • •

(17) Q. And what did you say to him after that, Mr. Bendersky? A. I asked—I think I asked him whether or not he could give us any information with respect to that homicide since he had been an occupant of the automobile.

Q. What did he say? A. I believe at first he said that he was very worried about himself and the safety of his family. I think he called his wife or his wife was called and she came down.

Q. She came down to the offices of the Parole— A. That's my recollection.

Q. —Board? (18) A. Yes, she came down herself and I believe the two of them, the husband and wife had some discussion.

Q. Now, where did that discussion take place? A. In the room.

Q. In the room that you occupied? A. I think it was in the room we occupied, or they were taken to a cubicle, I don't remember which, but we didn't hear any of the conversation between the two of them.

Q. When you say we, you're referring to Chief Edwards? A. And myself.

Q. And the parole officer? A. I don't know about him, but I don't think Chief Edwards—I know I didn't, but I don't think Chief Edwards heard any discussion between the two of them.

Q. But while he was discussing with his wife, I take it, you remained in the room with Chief Edwards and Mr. Quinn, if in fact he was there? A. Yes, I think there was a representative of the Parole Board there. We remained in the room.

Q. And after—how long did he spend talking with his wife, Mr. Bendersky? A. I would say 10 or 15 minutes.

Q. And after he spoke for 10 or 15 minutes with (19) his wife, was he returned to the room you were in? A. Yes, he came back.

Q. I see. And what discussion did you have with him at that time, Mr. Bendersky? A. He said that, my recollection is, that he said that his wife was very upset and depressed about this situation. However, she had given him permission to give me the facts provided that some assurance was given that she would be protected, that he would be protected and then he also said, and what about me?

Q. And when he said, what about me, Mr. Bendersky, what did you say to him about him? A. Well, I don't think I answered that at that moment. My recollection is that we had a discussion with Chief Edwards and I had a discussion with the parole officer—a member of the Parole Commission who's there.

Q. You spoke with a member of the Parole Commission who was there? A. Yeah.

Q. So, that after he inquired about his status, as you indicated to Mr. Edelbaum, you inquired about what his status was, I take it; is that correct? A. I must have.

(20) Q. You have no recollection? A. I don't have any independent recollection of that.

Q. And you just presumed that you inquired? A. I am fairly certain I had some discussion with respect to what his status was.

Q. You're fairly certain that you had some discussion with some representative as to what his status was? A. Yes.

Q. Can you recall now what you found out about that status? A. That he had some time to serve.

Q. Did you find out how much? A. I don't remember.

Q. Did you at any time find out? A. I believe so.

Q. You're not going on speculation, Mr. Bendersky, are you? A. Well, this happened some time ago.

Q. About six— A. I remember I discussed it, I remember that there was a discussion about the time he had left to spend and I remember I received some information about that.

• • •

(26) The Court: What precisely, Mr. Bendersky was the promise that you made to Getch, as you recall it?

The Witness: As I recall, I agreed with him on two situations. One that, this is to the best of my recollection, one, that his family will be brought out from Brooklyn, put into a house out here and given maximum security. Number—and number two, that he probably would out within a few months on condition that he give me a statement, a factual statement of everything he saw, heard and knew about this homicide.

• • •

Q. Now, do you recall a date or a time in the latter part of January or the early part of February, 1964, meeting Mr. Catterson, an Assistant District Attorney of Suffolk County and going with him into one of the front offices on the second story and discussing with him the witness Getch? A. I don't remember. He asked me yesterday, Mr. Catterson asked me yesterday. Was this after I left the District Attorney's office?

Q. Yes, early—late in February— A. My recollection is that I did not discuss the situation with any lawyer after I left the District Attorney's office.

Q. I see. A. Particularly of a conference on it.

Q. Now, do you recall going into those front offices with Mr. Catterson and having him ask you specifically whether any promise had been made to Getch by you in connection with taking this statement? A. I don't remember that. I don't know what the reason for it would be and I don't remember meeting with him or going into any office with him and him asking me that specific question.

• • •

(42) *Re-direct Examination by Mr. Edelbaum:*

Q. You were asked by Mr. Connors whether you made any written notation of a promise that you testified to this witness, and you said no; was it customary to make notations of promises to witnesses? A. No, sir.

Mr. Edelbaum: Thank you.

Re-cross Examination by Mr. Connors:

Q. I take it that was not your custom but you don't know what the custom of other people was; is that correct, Mr. Bendersky? A. Well, I was in the District Attorney's office over a period of 20 years and I never heard of any such member or any such notes made by a District Attorney.

* * *

(104) *Direct Examination by Mr. Edelbaum:*

Q. Mr. Bendersky, at any time in January or February of 1964, did you ever have any conversation with Mr. Catterson where you in substance said that you had never made a promise to Getch? A. Your Honor, may I have the first four or five questions that were asked of Mr. Catterson on direct examination read back pertaining to the conversation that I was supposed to have with Mr. Catterson?

The Court: Do you need it?

The Witness: Yes, I want to know the exact language that Mr. Catterson used. Your Honor, I think I can answer that without going back.

A. Mr. Edelbaum—I said on cross examination before it was cross, because I was put on as your witness, I said to Mr. Connors, that I didn't recall having had any such discussion with Mr. Catterson. After hearing Mr. Catterson (105) testify under oath, I can tell you now that I never went into his office or Inspector DeArmitt's office and I don't know why he says Inspector DeArmitt's office, that I was never asked about security and I never told him anything about security and I wasn't asked about any promises that I made. There would have been no reason for it at that time. No such issue had arisen.

Mr. Connors: I'm going to object to the part of the answer as not being responsive.

The Court: The last part of it, I'll strike it.

Mr. Connors: No reason.

Q. Do you state without equivocation that at no time did you ever have a conversation in January or February of 1964 with Mr. Catterson in Mr. DeArmitt's office, to the effect that you had never made a promise to Mr. Getch? A. I say so without equivocation.